PUBLIC PROSECUTOR

v.

AUDREY KEONG MEI CHENG

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' V.C. GEORGE JCA
DATO' AHMAD FAIRUZ B. DATO' SHEIKH ABDUL HALIM J
[CRIMINAL APPEAL NO. W-07 13-95]
6 OCTOBER 1995

CRIMINAL PROCEDURE: *Revision - Revisionary jurisdiction - High Court - Criminal Procedure Code Chapter XXXI - Whether to be exercised in two distinct steps - Invocation per se of s. 323 CPC by Judge - Calling of record and examination of order - Whether amounted to an exercise of power of revision - Criminal Procedure Code ss. 323, 324, 325, 326, 327 - Courts of Judicature Act s. 50(2), 51(1), old s. 66.*

CRIMINAL PROCEDURE: *Appeals - Appeal from exercise of revisionary jurisdiction of High Court - Criminal Procedure Code ss. 323, 324, 325 - Whether restricted to cases where Judge had actually revised order of Magistrate - Whether available upon mere invocation of s. 323.*

INTERPRETATION: *Courts of Judicature Act 1964 - Courts of Judicature (Amendment) Act 1995 - Deletion of s. 66 - Effect - Right to refer questions of law in criminal matters to Superior Court - Whether taken away by deletion of s. 66 - Sections 50(1)(b) & 50(2) - Whether in pari materia with s. 66(6)(b).*

WORDS & PHRASES: *"The exercise of any power of revision" - "the exercise of its revisionary jurisdiction" - Courts of Judicature Act 1964 s. 50, old s. 66.*

The Public Prosecutor has applied for a revision of an order of the learned Magistrate, wherein the respondent was ordered to be released from police custody on the ground that there was no lawful basis for her arrest. On 15 July 1994, Syed Ahmad Idid J examined the records and heard the parties in formal proceedings in open Court, pursuant to the provisions of Chapter XXXI Criminal Procedure Code (CPC) in particular ss. 323 and 326 thereof. Having done that, however, the learned Judge declined to revise the order ruling that it was a correct and proper order.

On 15 August 1994, 1 month after the Judge's ruling, the Public Prosecutor filed a motion under s. 66(2) Courts of Judicature Act 1964 (the Act), applying in effect to the Court of Appeal for leave to refer two questions of public interest arising from the ruling. Since the filing of the motion, however, the Courts of Judicature (Amendment) Act 1995 or Act A909, retrospectively came

into force, i.e from 24 June 1994. Act A909 wholly deleted s. 66 but widened the scope of s. 50 with the effect that, in respect of the said ruling of the Judge, the only way for the Public Prosecutor to question the decision was to appeal against it under s. 50(2) of the Act. Section 51(1), however, made it clear that the notice of appeal should be filed within two weeks from the date of the decision, so that, in the circumstances obtaining, the Public Prosecutor was clearly out of time. On 13 September 1994, while withdrawing the motion of 15 August 1994, the Public Prosecutor filed a new motion wherefore an extension of time was sought in respect of the filing of the notice of appeal. Opposing the motion, Counsel for the respondent cited the Court of Appeal in *Mohd Dalhar bin Redzwan & Anor. v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645, and contended that the decision of the Judge was not appealable as the Judge, in declining to revise the Magistrate's order, had in fact not exercised his revisionary power. In the event, the act of seeking an extension of time, according to Counsel, was nothing more than an exercise in futility.

In *Mohd Dalhar*, the Court gave judgment in respect of an application under s. 66 of the Act on 27 February 1995, well after the coming into force of Act A909, which deleted s. 66. That notwithstanding, the Court dealt with the issue of whether the refusal *per se* of the High Court to revise the inferior Court's decision came within the meaning of the words *"the exercise by the High Court of any power of revision"* under s. 66(5) of the Act. The Court held, by a majority, that the expression encompassed not only the calling of the records of the case but also the making of an order. Thus, according to the Court, *"revision is an act of calling for the record of a Subordinate Court and the making of one or more orders in respect thereof. Where the High Court calls for the record but having examined it, decides to take the matter no further, there is no revision"*.

Before the learned appeal Judges, the primary issues that arose were:

(1) Whether the pronouncements of law enunciated in *Mohd Dalhar* could still be regarded as authoritative nothwithstanding that the proceedings therein were iniatiated in compliance with a procedure that had been rendered useless.

(2) Whether the invocation *per se* by the Judge of the power given him by s. 323 CPC amounted in law to an exercise by him of his power of revision.

(3) In any case, whether appeals from the exercise of revisionary powers could arise upon invocation *per se* by the Judge of s. 323 CPC, or whether such appeals were restricted to cases where the Judge had actually revised the finding, sentence or order of the Magistrate.

Held: Per Siti Norma Yaacob JCA:

[1] The pronouncments of law enunciated in *Mohd Dalhar's* case can still be regarded as authoritative. The reasons being that the deletion of s. 66 has not taken away the right to refer the questions of law in criminal matters as that right is still maintained by Act A909 by making the necessary amendments to s. 50(2) of the Act, and secondly, that the use of an outdated procedure does not prejudice anybody as procedure is only the means by which a matter in issue is placed before a Court for determination, and therefore has no effect on any decision based on any substantive law.

[2] With respect, this Court has to endorse the sentiments as expressed by the dissenting Judge in *Mohd Dalhar* that once the High Court invokes s. 323 CPC, that invocation, *per se*, amounts to the exercise by the High Court of the power of revision even though the Judge chooses not to interfere with the Magistrate's order. This is because, although the Judge took the negative approach in refusing to interfere with the order, there is also the positive aspect of his decision in that, he is in fact confirming the Magistrate's order to be correct. The refusal to revise, thus, is in itself an act done in furtherance of the exercise of his power to revise.

[3] It ought to be also noted that the Judge here did not merely call the records of the proceedings and examine them as was done in *Mohd Dalhar*, but had taken a step further by adducing oral and documentary evidence through witnesses called by the Public Prosecutor. It was only pursuant to the evidence so gathered that the Judge was able to make a confirmative finding that the Magistrate was correct in releasing the respondent, and it was under these circumstances that he saw no necessity to revise the Magistrate's order. The learned Judge's order of 15 July 1994 is clearly appealable and the application of the Public Prosecutor, therefore, must be allowed.

Per V.C. George JCA (concurring):

[1] Although the panel that heard *Mohd Dalhar* was not appraised of the fact that s. 66 of the Courts of Judicature Act 1964 had been deleted by the amending Act A909/95, neither in the context of the issues in that case nor in the instant case, anything of significance turns on that. This is in view of the related amendments made to s. 50 of the Act of 1964, which sets out the jurisdiction of the Court of Appeal in respect of criminal appeals and which was expanded to include the exercise by the High Court of its revisionary jurisdiction.

[2] The words *"in the exercise of its... revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court" in s. 50(1)(b)* and *"...in the exercise of its...revisionary jurisdiction in respect of any*

criminal matter decided by a Magistrate Court..." in s. 50(2) of Act A909/95 are in *pari materia* with the words *"the exercise by the High Court of any power of revision under (any laws relating to criminal procedure)"* in the deleted s. 66(6) of the 1964 Act. And so, being in *pari materia* with the old s. 66, what was said about the exercise by the High Court of its powers of revision in *Mohd Dalhar* is applicable to the amended s. 50 in respect of the *"exercise of its revisionary jurisdiction"* by the High Court.

[3] The revisionary jurisdiction given to the High Court by Chapter XXXI of the CPC is to be exercised in two distinct steps, namely, the invocation of the power given by s. 323, and the exercise or refusal to exercise any one of the powers given by one or more of the sections, i.e ss. 324, 325, 326. The exercise of any of these powers, including the powers given by s. 323, is the exercise of a judicial power and is not a mere administrative act. It follows that when the old s. 66 and the amended s. 50 of the Act refer to *"the exercise of any power of revision"* or *"the exercise of its revisionary revision"* as the case may be, it includes by plain logic, the exercise of the power to call in and examine the record of the proceedings of the subordinate Court given to the Court by s. 323 CPC. The phrases thus apply to the invocation of the s. 323 powers notwithstanding that the Judge thereafter chooses not to make any order of revision. In the circumstances, it follows that in respect of this matter, the dissenting judgment in *Mohd Dalhar* must have expressed the correct view.

[4] In the instant case, the learned Judge, having called for the record, examined it in formal proceedings in open Court pursuant to s. 326 CPC. The phrase *"when exercising his powers of revision"* used in s. 326 in the context cannot but have reference to the Judge's examination of the record of the proceedings *"for the purpose of satisfying himself as to correctness, legality or propriety"* of the decision of the Magistrate. Clearly, it is in conjunction with the exercise of the powers given by s. 323 that it is relevant that he hears the parties or their Counsel. It would be illogical to suggest that the power to hear the parties in revisionary proceedings is to be exercised in conjunction with the exercise of the powers given by ss. 324 or 325 which clearly are powers to be exercised **after** the Judge had exercised the powers given to him by s. 323 and **after** he had made up his mind as to whether he should interfere and if so what orders he should make.

[5] In the circumstances, appeals from the exercise of revisionary powers are not restricted to cases where the Judge had actually revised some finding, sentence or order of the Magistrate. If that be the intention of the legislature, the general phrases in the old s. 66(5) or the amended s. 50 aforesaid would have been more restrictively couched, e.g with the phrase

"in the exercise of its revisionary powers pursuant to s. 325 of the Criminal Procedure Code", or in a more qualified term e.g *"in the exercise of its revisionary jurisdiction where an order of revision had been made"*.

Obiter dictum:

Had the effect of the invocation of s. 326 that resulted in there being a "hearing" in open Court followed by a refusal to revise the order of the Magistrate been considered in *Mohd Dalhar,* the majority view in that case might well have been different.

[Application allowed. Extension of time granted]

[Bahasa Malaysia *Translation of Headnotes]*

PROSEDUR JENAYAH: *Semakan - Bidangkuasa Penyemakan - Mahkamah Tinggi - Bab XXXI Kanun Prosedur Jenayah - Samada hendaklah dilaksanakan menurut dua langkah yang berbeza - Penggunaan per se s. 323 Kanun Prosedur Jenayah oleh Hakim - Meminta rekod dan pemeriksaan perintah - Samada membawa kepada suatu pelaksanaan kuasa penyemakan - Seksyen 323, 324, 325, 326, 327 Kanun Prosedur Jenayah - Akta Mahkamah Kehakiman s. 50(2), 51(1) s. 66 lama.*

PROSEDUR JENAYAH: *Rayuan - Rayuan terhadap pelaksanaan bidangkuasa penyemakan Mahkamah Tinggi - Kanun Prosedur Jenayah ss. 323, 324, 325 - Samada terhad kepada kes-kes di mana Hakim telah sebenarnya menyemak perintah Majistret - Samada boleh berbangkit dengan penggunaan semata-mata s. 323.*

PENTAFSIRAN: *Akta Mahkamah Kehakiman 1964 - Akta Mahkamah Kehakiman (Pindaan) 1995 - Penghapusan s. 66 - Kesan - Hak untuk merujuk persoalan undang-undang dalam perkara jenayah kepada Mahkamah Atasan - Samada terjejas dengan penghapusan s. 66 - Seksyen-seksyen 50(1)(b) & 50(2) - Samada in pari materia dengan s. 66(6)(b).*

PERKATAAN & ISTILAH: *"Perlaksanaan mana-mana kuasa penyemakan" - "Pelaksanaan bidangkuasa penyemakannya" - Akta Mahkamah Kehakiman 1964 s. 50, s. 66 lama.*

Pendakwa Raya telah memohon untuk mendapatkan suatu semakan terhadap perintah Majistret yang bijaksana, yang memerintahkan supaya responden dilepaskan dari tahanan polis atas alasan bahawa tidak terdapat asas yang sah di sisi undang-undang bagi penangkapannya. Pada 15 Julai 1994, Syed Ahmad Idid H memeriksa rekod-rekod dan mendengar pihak-pihak terbabit dalam satu prosiding formal di dalam Mahkamah terbuka, selaras dengan peruntukan-

peruntukan Bab XXXI Kanun Prosedur Jenayah (KPJ) khususnya ss. 323 dan 326 di situ. Setelah melakukan demikian, Hakim yang bijaksana, walaubagaimanapun, enggan menyemak keputusan perintah tersebut atas alasan bahawa ianya merupakan perintah yang betul dan wajar.

Pada 15 Ogos 1994, sebulan selepas keputusan Hakim, Pendakwa Raya telah memfailkan satu usul di bawah s. 66(2) Akta Mahkamah Kehakiman 1964 (Akta), memohon secara berkesannya kepada Mahkamah Rayuan untuk kebenaran bagi merujuk dua persoalan yang berkepentingan awam yang terbit daripada keputusan Hakim itu. Namun begitu, sejak pemfailan usul tersebut, Akta Mahkamah Kehakiman (Pindaan) 1995 atau Akta A909 dikuatkuasakan secara kebelakangan, iaitu bermula dari 24 Jun 1994. Akta A909 secara keseluruhannya menghapuskan s. 66 tetapi memperluaskan bidang s. 50 dan kesannya ialah, berhubung keputusan Hakim berkenaan, satu-satunya cara bagi Pendakwa Raya mempersoalkan keputusan itu adalah dengan merayu terhadapnya di bawah s. 50(2) Akta. Seksyen 51(1), walaubagaimanapun, menunjukkan dengan jelas bahawa notis rayuan harus difailkan dalam tempoh dua minggu daripada tarikh keputusan diberikan, dan dengan yang demikian, dalam keadaan yang wujud, Pendakwa Raya jelas telah terlewat masa. Pada 13 September 1994, sambil menarikbalik usul bertarikh 15 Ogos 1994 itu, Pendakwa Raya telah memfailkan satu usul yang baru di mana perlanjutan masa telah dipohon berhubung dengan pemfailan notis rayuan tersebut. Dalam menentang usul ini, Peguam responden telah memetik Mahkamah Rayuan dalam kes *Mohd Dalhar bin Redzwan & Anor. v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645, dan menegaskan bahawa keputusan Hakim disini tidak boleh dirayui kerana Hakim, apabila enggan menyemak perintah Majistret tersebut, telah pada hakikatnya tidak melaksanakan kuasa penyemakannya. Dalam keadaan tersebut, perbuatan memohon untuk untuk mendapatkan perlanjutan masa, menurut Peguam, adalah suatu permohonan yang sia-sia.

Dalam *Mohd Dalhar*, Mahkamah telah memberikan penghakiman berhubung dengan satu permohonan di bawah s. 66 Akta pada 27 Februari 1995, iaitu agak lama selepas Akta A909, yang menghapuskan s. 66, dikuatkuasakan. Tanpa menghiraukan perkara ini, Mahkamah telah bertindak terhadap isu samada keengganan *per se* Mahkamah Tinggi untuk menyemak keputusan Mahkamah Rendah dirangkumi oleh maksud perkataan-perkataan "pelaksanaan oleh Mahkamah Tinggi terhadap apa-apa kuasa penyemakan" dibawah s. 66(5) Akta. Mahkamah memutuskan, dengan majoriti, bahawa ungkapan itu melingkungi bukan sahaja permintaan bagi rekod-rekod kes tersebut, tetapi juga pembuatan sesuatu perintah. Dengan itu, mengikut Mahkamah, "penyemakan ialah perbuatan meminta rekod Mahkamah Rendah dan pembuatan satu atau lebih perintah-perintah berhubung dengannya. Dimana Mahkamah Tinggi meminta rekod tetapi setelah memeriksanya, membuat keputusan untuk tidak meneruskan perkara tersebut, maka tidak terdapat penyemakan".

Dihadapan Hakim-Hakim rayuan yang bijaksana, isu-isu utama yang berbangkit adalah:

(1) Samada pengisytiharan undang-undang yang diumumkan dalam *Mohd Dalhar* masih boleh dipakai walaupun prosiding-prosiding di dalamnya dimulakan dengan mematuhi prosedur yang sudah tidak berguna.

(2) Samada penggunaan *per se* oleh Hakim terhadap kuasa yang telah diberikan kepadanya oleh s. 323 KPJ, menurut undang-undang, membawa kepada perlaksanaan olehnya akan kuasa penyemakannya.

(3) Dalam apa keadaan pun, samada rayuan daripada pelaksanaan kuasa penyemakan boleh berbangkit setelah penggunaan *per se* s. 323 KPJ, oleh Hakim atau samada rayuan sedemikian terhad kepada kes-kes di mana Hakim telah sebenarnya menyemak keputusan, penghukuman atau perintah Majistret.

Diputuskan:

Oleh Siti Norma Yaakob HMR:

[1] Pengisytiharan undang-undang yang diumumkan dalam kes *Mohd Dalhar* masih boleh dipakai. Alasannya adalah penghapusan s. 66 tidak melucutkan hak untuk merujuk persoalan undang-undang dalam perkara-perkara jenayah oleh kerana hak itu masih dikekalkan oleh Akta A909 dengan membuat pindaan-pindaan yang perlu kepada s. 50(2) Akta dan keduanya, kerana penggunaan prosedur yang sudah lapok tidak memudaratkan sesiapa kerana prosedur hanyalah cara melalui mana sesuatu perkara yang dipersoalkan dikemukakan dihadapan Mahkamah untuk penentuan, dan dengan itu tidak mempunyai apa-apa kesan di atas mana-mana keputusan yang dibuat berdasarkan undang-undang substantif.

[2] Dengan hormatnya, Mahkamah ini harus mengesahkan pandangan yang dinyatakan oleh Hakim menentang dalam *Mohd Dalhar* bahawa sebaik sahaja Mahkamah Tinggi menggunakan s. 323 KPJ, penggunaan itu, *per se*, membawa kepada pelaksanaan oleh Mahkamah Tinggi akan kuasa penyemakannya, walaupun Hakim tersebut memilih untuk tidak mengganggu perintah Majistret. Ini adalah kerana, walaupun Hakim tersebut menggunakan pendekatan yang negatif dalam menolak untuk mengganggu perintah berkenaan, terdapat juga aspek positif dalam keputusannya itu, iaitu, beliau pada hakikatnya telah mengesahkan perintah Majistret tersebut sebagai betul. Keengganan untuk menyemak, dengan itu, adalah secara sendirinya merupakan suatu perbuatan yang dilakukan ekoran dari pelaksanaan kuasa menyemak.

[3] Adalah seharusnya diambil perhatian juga bahawa Hakim di sini bukan sahaja meminta rekod-rekod prosiding dan memeriksanya sepertimana yang dilakukan dalam *Mohd Dalhar*, tetapi telah mengambil langkah yang

seterusnya dengan mengemukakan keterangan lisan dan dokumentari melalui saksi-saksi yang dipanggil oleh Pendakwa Raya. Hanyalah dengan keterangan yang dikumpulkan sedemikian Hakim mampu membuat keputusan mengesahkan bahawa Majistret tersebut betul apabila melepaskan responden, dan di bawah keadaan-keadaan ini jugalah beliau mendapati tidak perlu untuk menyemak perintah Majistret tersebut. Perintah Hakim yang bijaksana bertarikh 15 Julai 1994 adalah jelas boleh dirayui dan permohonan Pendakwa Raya, dengan itu, haruslah dibenarkan.

Oleh V.C. George HMR (menyetujui):

[1] Walaupun panel yang mendengar *Mohd Dalhar* tidak dapat menilai fakta bahawa s. 66 Akta Mahkamah Kehakiman 1964 telah dihapuskan oleh Akta meminda A909/95, keadaan ini tidak menimbulkan apa-apa kesan penting, samada dalam konteks isu-isu yang berbangkit dalam kes itu atau pun dalam kes semasa. Ini adalah kerana pindaan-pindaan berkaitan dibuat kepada s. 50 Akta tahun 1964, membentangkan bidangkuasa Mahkamah Rayuan berhubung dengan rayuan-rayuan jenayah, bidangkuasa mana, merangkumi sama rayuan terhadap pelaksanaan oleh Mahkamah Tinggi akan bidangkuasa penyemakannya.

[2] Perkataan-perkataan "dalam melaksanakan bidangkuasa penyemakannya berhubung dengan mana-mana perkara jenayah yang diputuskan oleh Mahkamah Seksyen" dalam s. 50(1)(b) dan "dalam melaksanakan bidangkuasa penyemakannya berhubung dengan mana-mana perkara jenayah yang diputuskan oleh Mahkamah Majistret" dalam s. 50(2) Akta A909/95 adalah *in pari materia* dengan perkataan-perkataan "pelaksanaan oleh Mahkamah Tinggi akan apa-apa kuasa penyemakan di bawah (mana-mana undang-undang berkaitan dengan prosedur jenayah)" dalam s. 66(6) Akta 1964 yang telah dihapuskan itu. Oleh hal yang demikian, apa yang diperkatakan mengenai pelaksanaan oleh Mahkamah Tinggi berhubung dengan kuasa-kuasa penyemakannya dalam *Mohd Dalhar* adalah terpakai juga kepada s. 50 yang telah dipinda, berhubung dengan "pelaksanaan bidangkuasa penyemakan" oleh Mahkamah Tinggi.

[3] Bidangkuasa penyemakan yang diberikan kepada Mahkamah Tinggi melalui Bab XXXI KPJ hendaklah dilaksanakan dalam dua langkah yang berbeza, iaitu penggunaan kuasa yang diberikan oleh s. 323, dan pelaksanaan atau keengganan untuk melaksanakan mana-mana satu dari kuasa-kuasa yang diberikan oleh satu atau pun lebih dari seksyen-seksyen dalam Bab tersebut, iaitu, ss. 324, 325, 326. Pelaksanaan mana-mana kuasa ini, termasuk kuasa yang diberikan oleh s. 323, adalah pelaksanaan kuasa kehakiman dan bukannya hanya tindakan pentadbiran semata-mata. Ianya mengikut bahawa bilamana s. 66 lama dan s. 50 Akta yang terpinda itu merujuk kepada "pelaksanaan mana-mana kuasa penyemakan" sepertimana keadaannya, ianya secara lojik termasuk pelaksanaan kuasa untuk meminta dan

memeriksa rekod-rekod prosiding Mahkamah Rendah yang diberikan kepada Mahkamah Tinggi oleh s. 323 KPJ. Ungkapan-ungkapan tersebut dengan itu terpakai kepada penggunaan kuasa-kuasa s. 323 walaupun Hakim berkenaan, selepas itu, memilih untuk tidak membuat apa-apa perintah semakan. Oleh hal yang demikian, ianya mengikut, bahawa berhubung dengan perkara ini, penghakiman menentang dalam *Mohd Dalhar* telah menyatakan pendapat yang betul.

[4] Dalam kes semasa, Hakim yang bijaksana, setelah meminta rekod berkenaan telah memeriksanya dalam prosiding formal dalam Mahkamah terbuka selaras dengan s. 326 KPJ. Ungkapan "ketika melaksanakan kuasa-kuasa penyemakannya" yang digunakan dalam s. 326 di dalam konteks tersebut hanya boleh merujuk kepada pemeriksaan oleh Hakim ke atas rekod prosiding tersebut "bagi tujuan memuaskan hatinya sendiri berhubung dengan ketepatan, keesahan atau kewajaran" keputusan Majistret. Jelaslah, kerelevanan bagi Hakim mendengar pihak-pihak terbabit atau pun Peguam mereka adalah berkait rapat dan selaras dengan kuasa-kuasa yang diberikan oleh s. 323. Ianya tidak lojik untuk menyarankan bahawa kuasa untuk mendengar pihak-pihak yang terbabit dalam prosiding penyemakan hendaklah dilaksanakan selaras dengan pelaksanaan kuasa-kuasa yang diberikan oleh ss. 324 atau 325, yang mana, adalah secara jelasnya merupakan kuasa-kuasa untuk dilaksanakan **selepas** Hakim telah melaksanakan kuasa-kuasa yang diberikan kepadanya oleh s. 323 dan **selepas** beliau membuat keputusan mengenai samada beliau seharusnya mencampuri, dan jika begitu, apakah bentuk perintah yang harus beliau buat.

[5] Oleh hal yang demikian, rayuan terhadap pelaksanaan kuasa-kuasa penyemakan adalah tidak terhad kepada kes-kes di mana Hakim telah sebenarnya menyemak sesuatu penemuan, keputusan, penghukuman atau perintah Majistret. Jika itulah niat perundangan, tentulah ungkapan-ungkapan umum dalam s. 66(5) lama atau s. 50 yang telah dipinda itu akan diungkapkan dengan cara yang lebih terhad, seperti "dalam melaksanakan kuasa-kuasa penyemakannya selaras dengan s. 325 Kanun Prosedur Jenayah", atau, menurut cara yang lebih terbatas seperti "dalam melaksanakan bidangkuasa penyemakannya di mana sesuatu perintah penyemakan telah dibuat".

Obiter dictum:

Sekiranya kesan penggunaan s. 326 yang mengakibatkan suatu "perbicaraan" di dalam Mahkamah terbuka yang diikuti oleh keengganan untuk menyemak perintah Majistret dipertimbangkan dalam *Mohd Dalhar*, pendapat majoriti dalam kes itu mungkin berbeza.

[Permohonan dibenarkan. Perlanjutan masa dibenarkan].

Case referred to:

Mohd. Dalhar bin Redzwan & Anor. v. Datuk Bandar, Dewan Bandaraya, Kuala Lumpur [1995] 1 MLJ 645 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 117, 323, 324, 325, 326, 327
Courts of Judicature Act 1964, s. 66(2), (5), (6)
Courts of Judicature (Amendment) Act 1995 (Act A909), s. 50, (2), (3), 51(1), (2), (5), (5)(b)
Penal Code, s. 409

For the applicant - Wong Kian Keong, DPP (Ruzaina bte Wan Haniff DPP, with him)
For the respondent - Yusof Khan bin Ghows Khan; M/s. Yusof Lee & Pathma

JUDGMENT

Siti Norma Yaakob JCA:

We had on 20 September 1995, allowed the Public Prosecutor's application in these proceedings and we now give our reasons for having decided so.

On 5 May 1994, one Lim Chin Teik, the respondent's husband was charged in the Sessions Court, Kuala Lumpur with an offence punishable under s. 409 of the Penal Code in that he committed criminal breach of trust of RM890,973.36, to which he was entrusted as the Stock Broking Manager of Zalik Securities Sdn. Bhd. Lim claimed trail and he was released on bail of RM500,000 with one surety.

Further investigations by the police revealed that Lim has passed on a number of share certificates of various counters and cash of RM70,000 to the respondent and when she was questioned about this, she promised that she would surrender all the share certificates and cash which had been given to her by Lim. She however failed to do so.

On 11 May 1994, the police arrested the respondent at the premises of the High Court in Jalan Duta, where she had reappeared to accompany Lim, who was seeking to obtain a Court order to reduce his bail.

The next day, the respondent was produced before the Registrar of the Magistrate's Court for the purpose of obtaining an extension of her remand under s. 117 of the Criminal Procedure Code (CPC). The Registrar, in her capacity as a Magistrate, found that since the arrest of the respondent was made without a warrant and that the respondent was not told the reason of her arrest and detention, disallowed the application for extension and released the respondent from custody.

The Public Prosecutor then applied to the High Court to revise the decision of the Magistrate and on 15 July 1994, Syed Ahmad Aidid J, ruled that there was no necessity to revise the Magistrate's order as the learned Judge found the order to be correctly and properly made.

Undaunted by the learned Judge's refusal to revise, the Public Prosecutor on 15 August 1994, initially filed proceedings under s. 66(2) of the Courts of Judicature Act 1964 (the Act), for leave to have two questions of law of public interest determined by this Court. However, since the filing of the Originating Motion, the whole of s. 66 of the Act has been deleted by the Courts of Judicature (Amendment) Act 1995 (Act A909) which was gazetted on 16 February 1995 to take effect retrospectively from 24 June 1994.

Section 2 of Act A909 has also widened the scope of s. 50 of the Act and in particular subsection (2) of the same section is now worded as follows:

> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

Thus as at 24 June 1994, any person dissatisfied with any decision with any decision of the High Court made in the exercise of its appellate or revisionary jurisdiction in criminal matters decided by a Magistrate's Court may, with leave of this Court, appeal against such a decision provided that the appeal concerns questions of law which had arisen in the course of the appeal or revision.

Where however the aggrieved party is the Public Prosecutor, no leave is necessary (subsection (3) of the same section) but under s. 51(1) of the Act, the Public Prosecutor, like any other appellant, is required to file his notice of appeal within fourteen days after the date of decision appealed against.

Thus following the amendments to the law which I have averred to above, the only way the Public Prosecutor can question the decision of the learned Judge in the case before us is to appeal against such a decision under the provisions of s. 50(2) of the Act and the procedure set out under s. 51(1). Clearly the Public Prosecutor was out of time as the order appealed against was made on 15 July 1994 and hence the second originating motion dated 13 September 1995 filed by the Public Prosecutor applying for an extension of time to file a notice of appeal under s. 56 of the Act.

At the hearing of the application, Encik Wong Kian Keong, the Deputy Public Prosecutor, withdrew the earlier Originating Motion filed under the deleted s. 66(2) of the Act and we accordingly struck out that application.

The two said to be questions of law to be referred to the Court of Appeal for determination are as follows:

1. Whether in law it is necessary for a Magistrate in an application by the police for remand under s. 117 Criminal Procedure Code to inquire and

to determine as to the lawfulness of the arrest of the person whose remand is sought; and

2. If the answer to the first question is in the affirmative, whether the Magistrate is barred in law from ordering remand under s. 117 Criminal Procedure Code on the ground that the arrest of the person sought to be remanded is found to be unlawful.

These can be no doubt that each of these questions are questions of law of public interest, which no doubt is why, whilst not objecting directly to the application for extension of time, Encik Yusof Khan, Counsel for the respondent nevertheless raised the issue of whether the decision of the learned Judge made on 15 July 1994 is appealable, for he maintains that in declining to revise the Magistrate's order made on 12 May 1994, the learned Judge, had in fact not exercised his revisionary power. Hence on the facts of this case he submits that seeking an extension of time to file a notice of appeal is an exercise in futility. In this respect, Encik Yusof Khan relied on the majority decision of this Court (Shaik Daud JCA, Gopal Sri Ram JCA, and V.C. George JCA) in the case of *Mohd. Dalhar bin Redzwan & Anor. v. Datuk Bandar, Dewan Bandaraya, Kuala Lumpur* [1995] 1 MLJ 645.

In that case there was an application for leave to refer certain questions of law, the principal one being whether a party whose application for revision has been refused by the High Court may apply to this Court. Before I proceed to consider *Mohd. Dalhar*'s case, there is one observation I wish to make and it relates to the procedure that was adopted by the parties in that case.

The application for leave by Mohd. Dalhar was made under s. 66(1) and (5) of the Act, which has been seen earlier had been deleted by Act A909, effective from 24 June 1994. However Act A909 was only gazetted on 16 February 1995, and it would appear that on 6 February 1995 when Mohd. Dalhar's application was heard, the gazette notice had not been published and therefore neither the members of the Court nor Counsel were aware that s. 66 of the Act was no longer available. However when judgment on Mohd. Dalhar's application was delivered on 27 February 1995, a different situation presented itself as by then, the gazette notice had already appeared informing all and sundry that s. 66 of the Act had been deleted retrospectively from 24 June 1994. Alas nobody had been made wiser by the notification and the question that arises is whether the pronouncements of law enunciated in *Mohd. Dalhar's* case can still be regarded as authoritative bearing in mind that proceedings were initiated in compliance with a procedure that even then had been rendered useless.

I answer this in the affirmative for the following reasons.

To begin with the deleted s. 66 is concerned with the right to refer and the procedure to be followed where a party seeks to have certain questions of law of public interest determined by this Court. In deleting s. 66, Act A909 has not done away with the right to refer altogether. This is so as s. 2 of Act A909 has widened the scope of s. 50 of the Act by inserting at subsection (2) of the same section the power of this Court to determine any question of law that has arisen in the course of any criminal appeal or revision heard by the High Court in respect of any criminal matter decided by a Magistrate's Court. Thus the deletion of s. 66 has not take away the right to refer questions of law in criminal matters as that right is still maintained by Act A909 by making the necessary amendments to s. 50(2) of the Act. It is interesting to note that the requirement that such questions of law must be of public interest under the deleted s. 66(1) is no longer a requirement under the provisions of the amended s. 50(2).

As for the circumstances when an appeal on any point of law can arise and the procedure to be followed when such an appeal is lodged, those matters are also amply provided for in s. 50(2) as amended and read together with s. 51 of the Act.

In any event, the use of an outdated procedure should not I consider prejudice anybody as procedure is only the means by which a matter in issue is placed before a Court for determination. It has no effect on any decision based on any substantive law.

Returning to *Mohd. Dalhar*'s case, the facts are that Mohd. Dalhar, the first applicant as the general manager of Zaibar Auto (M) Sdn. Bhd. the second applicant (the company), had on behalf of the company pleaded guilty before the Magistrate to a charge of contravening certain trade bye-laws. He was convicted, fined RM500 and ordered to pay a penalty of RM100 per day for as long as the offence continued. He paid the fine but refused to pay the penalty. The company did not appeal against the sentence but instead Mohd. Dalhar wrote to the High Court asking for the Magistrate's orders to be revised. The High Court Judge exercised his powers under s. 323 of the CPC by calling for the records of the case and after examining them refused to revise the orders made by the Magistrate. The issue before the Court of Appeal then was whether the refusal of the High Court to revise, *per se*, came within the meaning of the words "the exercise by the High Court of any power of revision" under s. 66(5)(b) of the Act. By a majority (V.C. George JCA dissenting) the Court of Appeal dismissed the application and held that the expression "the exercise by the High Court of any power of revision" in s. 66(5) (b), encompasses not only the calling of the records of the case but also the making of an order. "When read in its proper context, revision is the act of calling for the record of a subordinate Court and the

making of one or more orders in respect thereof. Where the High Court calls for the record but having examined it, decides to take the matter no further, there is no revision" per Gopal Sri Ram JCA.

In his dissenting judgment, V.C. George JCA approached the issue on two premises. The first is that there must be equality of consequences between the parties arising from a decision of the Judge and this is expressed in his judgment in the following manner:

> It has been suggested in the course of this application that s. 66(1) may not be properly invoked in respect of the exercise of the powers given by s. 323 of the Criminal Procedure Code unless the Judge concerned had gone on to exercise the powers given to him by s. 324 and/or s. 325. The effect of this suggestion is that the party aggrieved by the Judge not interfering with the Magistrate's decision or order although invited to do so and even if there has been a blatant miscarriage of justice, may not seek to take the matter further whereas the party on the other side may do so if the Judge had interfered.

It is this lack of equality of consequences which V.C. George JCA found to be inequitable and wherein lies the injustice of the whole situation.

Secondly, my learned brother took into account the provisions of s. 326 of the CPC, which in substance states as follows:

> **Permission to parties to appear.**
>
> 326. No party has any right to be heard, either personally or by advocate before a Judge when exercising his power of revision: provided that such Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate.

V.C. George JCA then concluded that the moment the Judge decides to exercise his powers of revision under s. 323 of the CPC, by calling for the Magistrate's record of proceedings and examining it, he would have already set into motion the process of deliberating on the order, if any, that he should make, and under these circumstances the exercise of his power to revise is not limited to his making the orders he is permitted to make either pursuant to s. 324 (power to order further inquiry) of s. 325 (powers of the Judge on revision).

With respect we endorse the same sentiments as that expressed by V.C. George JCA that once the High Court invokes s. 323 of the CPC, that invocation, *per se*, amounts to the exercise by the High Court of the power of revision even though the Judge chooses not to interfere with the Magistrate's order or decision.

We say so on the basis that although the Judge took the negative approach in refusing to interfere with the Magistrate's order, there is also the positive aspect of his decision in that he is in fact confirming the Magistrate's order

to be correct. Viewed from that perspective, we say that the refusal to revise is in itself an act done in furtherance of the exercise of his power to revise. In this case he did so not merely by calling for the records of the proceedings before the Magistrate and examining them as was done in *Mohd. Dalhar's* case but had also taken one step further to adduce oral and documentary evidence through witnesses called by the Public Prosecutor to establish the circumstances surrounding and leading to the arrest of the respondent. That further step was never taken by the learned Judge in *Mohd. Dalhar*'s case. It was only pursuant to the evidence gathered by the Judge at the hearings conducted by him on 23 May 1994 and 1 June 1994 that the Judge was able to make a confirmative finding that the Magistrate was correct in releasing the respondent from the custody of the police as there was no lawful basis for her arrest in the first place as *inter alia*, she was not informed of the offence of offences she was alleged to have been committed at the time of her arrest. It was under these circumstances that the learned Judge saw no necessity to revise the Magistrate's order.

For the reasons stated, we consider the learned Judge's order of 15 July 1994 to be appealable and to that end we had accordingly allowed the application of the Public Prosecutor for an extension of time of one week to file and serve a notice of appeal on the respondent against the order dated 15 July 1994.

V.C. George JCA:

I have had the benefit of reading the judgment herein, in draft, of Dato' Justice Siti Norma HMR with which for the reasons given therein and for the reasons I had given in my dissent from the majority opinion in *Mohd. Dalhar bin Redzwan & Anor. v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 (CA), I respectfully concur.

It is unfortunate that the panel that heard *Mohd. Dalhar bin Redzwan*, was not appraised of the fact that s. 66 of the Courts of Judicature Act 1964 had been deleted by the amending Act A 909/95. However neither in the context of the issues in that case nor in the instant case, anything of significance turns on that because of the related amendments made to s. 50 of the Act of 1964.

Section 66 had provided for leave to be obtained, to appeal to the Court of Appeal the determination by the High Court of an appeal from the decision of a subordinate Court in a criminal matter. By subsection (5)(b) of s. 66 "the exercise by the High Court of any power of revision under any such law (i.e. relating to criminal procedure) shall be deemed to be an appeal from a decision of a subordinate Court in a criminal matter." With and consequent to the deletion of s. 66, s. 50 of the Act which sets out the jurisdiction of the Court of Appeal in respect of criminal appeals was expanded to include the exercise by the High Court of its revisionary jurisdiction. For ease of reference the amended version of the section is reproduced with the amendments highlighted:

50.(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate **or revisionary** jurisdiction in respect of any criminal matter decided by the Sessions Court.

(2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate **or revisionary** jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law "**which have arisen in the course of appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.**

(2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.

(3) Notice of any appeal by the public prosecutor shall be given by, or with the consent in writing of, that officer only; and notwithstanding subsection (2) no leave of the Court of Appeal is required.

(4) Except as otherwise provided in this section, an appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

The words, "The exercise by the High Court of any power of revision under (any laws relating to criminal procedure)" in s. 66(6)(b), that fell for construction in *Mohd. Dalhar bin Redzwan* as to their true effect, are in *pari materia* with the amending words in s. 50 that now provides the revisionary jurisdiction to the High Court. The relevant words in s. 50 (1) (b) and in s. 50(2) as have been seen are:

(b) in the exercise of its ... revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

in the former, and in the latter:

(2) ... in the exercise of its ... revisionary jurisdiction in respect of any criminal matter decided by a Magistrate Court ...

And so, being in *pari materia* with the relevant provisions in the old s. 66, what was said about the exercise by the High Court of its powers of revision in *Mohd. Dalhar bin Redzwan* is applicable to the amended s. 50 in respect of the "exercise of its revisionary jurisdiction" by the High Court.

Now, in *Mohd. Dalhar bin Redzwan* as has been pointed earlier, I had given a dissenting judgment. The instant matter has given me the opportunity of taking a second look as it were, at the relevant issue and having done so am respectfully of the opinion that my dissenting judgment expresses the correct view to be taken of the matter.

The jurisdiction provided by the old s. 66 and now by the amended s. 50, arises out of the exercise of the powers of revision as prescribed in Chapter XXXI of the Criminal Procedure Code the sections of which for ease of reference are reproduced with their respective headings:

323. Power to call for records of inferior Courts.

(1) A Judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

(2) Orders made under ss. 97 and 98 are not proceedings within the meaning of this section.

324. Power to order further inquiry.

(1) On examining any record under the last preceding section, or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under s. 135, or into the case of any accused person who has been discharged.

(2) The provisions of s. 303A shall apply for the construction of subsection (1).

325. Powers of Judge on revision.

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of the conviction.

326. Permission for parties to appear.

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: provided that such Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection (2) of the last preceding section.

327. Orders of revision.

When a case is revised under this Chapter by a Judge he shall certify his decision or order to the Court by which the finding, sentence or order revised was recorded or passed stating, where such finding, sentence or order has been

varied, the grounds for such variation; and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

In *Mohd. Dalhar bin Redzwan*, I had discussed at some length the application of the various sections that make up Chapter XXXI of the Criminal Procedure Code and I reiterate what I had said there in support of the conclusions that I arrive here.

The headings of the sections show the direction to be taken to arrive at the conclusion that the revisionary jurisdiction given to the High Court by chapter XXXI is to be exercised in two clear and distinct steps the first of which is the invocation of the power given by s. 323 i.e. to call for and examine the record of the proceedings, which would be followed by the exercise or the refusal to exercise, any one or more of the powers given by one or more of the sections, ss. 324, 325 and 326.

Now, the powers given by each of the sections in Chapter XXXI can be exercised by any Judge of the High Court. The exercise of any of these powers, including the powers given by s. 323, is the exercise of a judicial power and is not a mere administrative act e.g. by the Judge for the time being having the administrative supervisory role over the subordinate Court concerned.

It follows that when the old s. 66 and the amended s. 50 of the Courts of Judicature Act refer to "the exercise of any power of revision" of "the exercise of its revisionary jurisdiction", as the case may be, it will by plain logic include the exercise of the power to call in and examine the record of the proceedings of a subordinate Court given to the Court by s. 323 of the Criminal Procedure Code.

In *Mohd. Dalhar bin Redzwan*, the Judge of the High Court invoked the s. 323 powers of revision by calling for and examining the record and did so in the privacy of his Chambers without the assistance or presence of Counsel or of the parties, before deciding not to interfere with the Magistrate's decision. In the instant case the learned Judge having called for the record, examined it in formal proceedings in Open Court, in the course of which he, *inter alia*, had read to him affidavits filed in respect of the revision and heard Counsel for the parties on it. He did this by invoking the powers given by s. 326 which empowers the Judge to hear the parties and/or Counsel "when exercising his powers of revision". This phrase used in s. 326 in the context, cannot but have reference to the Judge's examination of the record of the proceedings "for the purpose of satisfying himself as to correctness, legality or propriety" of the decision of the Magistrate. It clearly is in conjunction with the exercise of the powers given by s. 323 that it is relevant that he hears the parties or their Counsel. It would, in my respectful Judgment, be illogical to suggest that the power to hear the parties in revisionary proceedings is to be exercised in

conjunction with the exercise of the powers given by ss. 324 or 325 which clearly are powers to be exercised, in the discretion of the Judge, **after** he had exercised the powers given to him by s. 323 and after he had made up his mind as to whether he should interfere and if so what order he should make. I would add that if it was the intention of the legislature to restrict appeals from the exercise of revisionary powers only to cases where the Judge had actually revised some finding, sentence or order of the Magistrate, then neither in the old s. 66(5)(b) nor in amended s. 50 would the phrase have been a general reference to "the exercise of any power of revision" or "the exercise of its revisionary jurisdiction" but would have been couched in more restrictive terms e.g. "in the exercise of its revisionary powers pursuant to s. 325 of the Criminal Procedure Code" or in qualified terms e.g. "in the exercise of its revisionary jurisdiction where an order of revision had been made."

An examination of the sections in Chapter XXXI in the face of a case like the instant case where the Judge had an actual and formal hearing, I think brings home the fact that the phrase "in the exercise of any power of revision" in s. 66 has application to the invocation of the s. 323 powers even though the Judge thereafter choses not to make any order of revision. I respectfully venture to suggest that had the effect of the invocation of s. 326 that resulted in there being a "hearing" in open Court followed by a refusal to revise the order of the Magistrate been considered in *Mohd. Dalhar bin Redzwan,* the majority view in that case might very well have been different.

Reported by W.A. Sharif